STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0017

State of Minnesota,
Respondent,

vs.

Danna Rochelle Back,
Appellant.

Filed April 7, 2009
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. CR-07-5374

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Lansing, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

Appellant Danna Rochelle Back challenges her second-degree manslaughter conviction, arguing that the evidence was insufficient to prove her guilt. Appellant also challenges the denial of her motion for a new trial. We affirm.

D E C I S I O N

I.

A jury convicted appellant of second-degree manslaughter after a three-day trial and four days of deliberations. Appellant argues that the evidence offered by the state was insufficient to prove that she was culpably negligent in the death of the victim, D.H., or that she was the proximate cause of D.H.'s death.

In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). And the reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

A person who causes the death of another is guilty of second-degree manslaughter "by the person's culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another." Minn. Stat. § 609.205(1) (2006). Culpable negligence is "intentional conduct which the actor may not intend to be harmful but which an ordinary and reasonably prudent man would recognize as involving a strong probability of injury to others." *State v. Chambers*, 589 N.W.2d 466, 478 (Minn. 1999) (quoting *State v. Beilke*, 267 Minn. 526, 534, 127 N.W.2d 516, 521 (1964)). A conviction of second-degree manslaughter requires proof of both an objective element of negligence and subjective element of recklessness. *State v. Grover*, 437 N.W.2d 60, 63 (Minn. 1989). And the defendant's negligence must be the proximate cause of the victim's death. *State v. Crace*, 289 N.W.2d 54, 60 (Minn. 1979) (citing *State v. Schaub*, 231 Minn. 512, 520, 44 N.W.2d 61, 66 (1950)).

On January 1, 2007, appellant called D.H.'s house around 3 a.m. While talking with D.H., appellant heard female voices in the background and became angry. Appellant subsequently called her friend Nicholas Super and asked him for a ride to D.H.'s house. Super agreed to take her to D.H.'s residence. Before dropping her off in the alley behind D.H.'s house, Super told appellant that she and D.H. "better not start arguing." After appellant entered D.H.'s home, she and D.H. began arguing in the kitchen. D.H. left through the back door to take his dog outside and saw Super's car in the alley behind his house. D.H. and Super began to argue, then D.H. came back inside and continued arguing with appellant. D.H. became upset that Super gave appellant a ride to his house and pushed appellant out onto the back deck into the deck railing, telling

her to leave. As appellant was standing up after being pushed, she saw D.H. and Super standing near each other on the deck stairs. Appellant heard a shot and saw D.H. fall to the ground. Super ran to his car and drove away and D.H. died of a gunshot wound that morning.

The record indicates that appellant and victim D.H. had had an on-again, off-again relationship for several years prior to his death and were not dating at the time of D.H.'s death on January 1, 2007. The record further indicates that during the summer of 2006, appellant dated Super but that they were also not dating at the time of D.H.'s death. Prior to January 1, 2007, Super and D.H. had previous conflicts due to their relationships with appellant. During her police interview, appellant stated that she knew: Super was still interested in dating her, Super owned a gun, Super had shot his gun in the air outside of D.H.'s residence, Super had shot two bullets into D.H.'s garage door, D.H. had called the police after Super threatened him, and Super had been "known to pull his gun out on . . . anybody."

Gross negligence

To establish the objective element of negligence for culpable negligence, the state must prove "a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." *State v. Zupetz*, 322 N.W.2d 730, 733 (Minn. 1982) (quotation omitted).

Appellant argues that the state failed to prove that she was grossly negligent because the act of asking Super for a ride to D.H.'s house cannot amount to gross negligence. Appellant contends that under Minnesota caselaw a more overt act is

required for the element of gross negligence to be met, such as the personal handling of the weapon that caused the death of another. Appellant cites three applicable cases for this proposition. In *State v. King*, this court concluded the evidence was sufficient to sustain appellant's conviction of second-degree manslaughter in the stabbing death of her husband because the appellant's conscious actions allowed the jury to infer an unreasonable risk of serious harm "when she thrust[ ] a butcher knife in close proximity to [the victim's] chest." 367 N.W.2d 599, 603 (Minn. App. 1985). In *State v. Gibbons*, the supreme court held that the appellant was guilty of second-degree manslaughter because it concluded that he was culpably negligent in playing with loaded weapons after smoking marijuana. 305 N.W.2d 331, 336-37 (Minn. 1981). And in *State v. Spann*, the factual basis of appellant's guilty plea was sufficient to uphold his conviction of second-degree manslaughter because the appellant used a knife, understanding that "someone could get hurt" by his actions. 289 Minn. 497, 499, 182 N.W.2d 873, 875 (1970).

Although three of the cases cited by appellant involve direct evidence of a defendant wielding a weapon, Minn. Stat. § 609.205(1) contains no such requirement. Moreover, not all second-degree manslaughter cases involve defendants wielding weapons. *See State v. Cantrell*, 220 Minn. 13, 17-18, 18 N.W.2d 681, 683 (1945) (concluding that a defendant, who was supposed to be guarding the entrance of a building that was being fumigated with lethal gases, was grossly negligent and properly charged with second-degree manslaughter after he left the building entrance and a child later entered the building and died); *Schaub*, 231 Minn. at 520-21, 44 N.W.2d at 65-66

(determining that a defendant was properly charged with manslaughter after his act of turning on the gas in his apartment led to an explosion, killing the building owner).

To support its case for second-degree manslaughter here, the state introduced evidence of: (1) the prior intimate relationship between appellant and Super; (2) appellant's knowledge that Super previously fired a gun into the victim's garage; (3) appellant's knowledge of the past conflicts between Super and the victim; and (4) appellant's knowledge that Super carried a gun. On this record, although appellant did not shoot D.H., we cannot say that in light of the evidence presented, a reasonable jury could not infer that appellant was grossly negligent in getting Super to drive her to the victim's house.

We also reject appellant's argument that this case is controlled by *State v. Beilke*, where the Minnesota Supreme Court reversed a second-degree manslaughter conviction, concluding that the death was not a result of culpable negligence. 267 Minn. 526, 533-34, 127 N.W.2d 516, 521-22 (1964). In *Beilke* the court determined that the appellant's actions—carrying a rifle in close proximity to his son's crib without checking to see if the gun was loaded, and then bumping into the crib and causing the rifle to discharge, thereby killing his son—could not "be said to have been such that a reasonable or ordinarily prudent man would consider likely to result in injury to another." *Id.* at 534, 127 N.W.2d at 522. But in *Beilke*, the court reversed appellant's conviction because the appellant did not know or have reason to know that the rifle was loaded, and therefore the appellant's negligence, if any, was insufficient for second-degree manslaughter. *Id.*

Appellant called Super to ask him for a ride to D.H.'s house, knowing about Super and the victim's past conflicts and knowing that Super was known to carry and use a gun.

Although the facts of this case are unusual, we are required to assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *Moore*, 438 N.W.2d at 108. Additionally, we are required to review the evidence in the light most favorable to the conviction. *Webb*, 440 N.W.2d at 430. On this record we conclude that the evidence is sufficient to support a jury determination that the element of gross negligence was met.

Recklessness

To establish the subjective element of recklessness for culpable negligence, the state must show "an actual conscious disregard of the risk created by the conduct." *State v. Frost*, 342 N.W.2d 317, 320 (Minn. 1983).

Appellant argues that despite her knowledge that Super owned a gun, and her knowledge of the previous shooting incidents, she was not actually aware that D.H. might be harmed or killed by Super. Appellant asserts that the state failed to show that appellant was aware of the risk created by her conduct, and that in ignoring that risk, she consciously took the chance of causing another's death or serious injury. Again, appellant argues that the circumstances of her case are too different from Minnesota cases upholding second-degree manslaughter convictions. We disagree.

In *King*, the court stated "the jury could easily infer" that the defendant was "aware of the risk" created by her conduct when she thrust a butcher knife near her husband's chest. 367 N.W.2d at 603. The jury here could have likewise determined that

appellant was aware of a risk in Super driving her to D.H.'s house in light of the hostility and past conflicts between Super and D.H. In *Gibbons*, the court concluded that the fact that the defendant smoked marijuana before he and the decedent played with guns was a factor in determining that the defendant was culpably negligent. 305 N.W.2d at 336-37. Here, because the record indicates that both appellant and Super had been at bars and parties all night before the shooting, the jury could have inferred that appellant and Super were intoxicated, and that their intoxication coupled with appellant's conduct was reckless. In *Spann*, the court held that the defendant was aware of the risk when he brought a knife to a fight and understood that "someone could get hurt." 182 N.W.2d at 875. Here, appellant brought Super to D.H.'s house with knowledge that Super had threatened D.H., that the two of them had prior conflicts, and that Super was known to carry a gun.

We also reject appellant's claim that *Frost* supports her argument that her conduct lacked the subjective element of recklessness. In *Frost*, the court held that the jury could infer that the defendant was aware of the risk created by her conduct when she shot her husband in a struggle after arming herself with a gun. 342 N.W.2d at 320. Just as the appellant in *Frost* should have known that the dangerous weapon she possessed was capable of being discharged in a struggle, the jury could have reasonably concluded that appellant should have known that Super was capable of shooting D.H.

Finally, as with the first element of gross negligence, in reviewing the sufficiency of the evidence, we defer to the credibility determinations of the jury and are required to review the evidence in the light most favorable to the conviction. *Moore*, 438 N.W.2d at

108; *Webb*, 440 N.W.2d at 430. Applying this standard, we conclude that the evidence is sufficient to support a jury determination that the element of recklessness was met here.

Proximate cause

The defendant's negligence must be the proximate cause of the victim's death. *Crace*, 289 N.W.2d at 60 (citations omitted). Appellant argues that the state failed to prove that appellant's actions were the proximate cause of the victim's death because Super's conduct constituted an intervening cause, relieving appellant of criminal liability for the victim's death. We disagree.

To sustain a manslaughter conviction the defendant's act must be the "proximate cause [of death] without the intervention of an efficient independent force in which defendant did not participate or which he could not have reasonably foreseen." *Schaub*, 231 Minn. at 517, 44 N.W.2d at 64. An intervening cause bars criminal liability if: (1) its harmful effects happened after the original negligence; (2) it did not happen because of the original negligence; (3) it changed the natural course of events and made the result different from what it would have been; and (4) the original negligent actor could not have reasonably anticipated this event. *State v. Hofer*, 614 N.W.2d 734, 737 (Minn. App. 2000). All four elements must be satisfied before the intervening cause acts as a bar to criminal liability. *Id.* Therefore, we apply the four *Hofer* elements to the circumstances in this case.

The original negligence here was appellant asking Super to drive her to D.H.'s house. Because the intervening cause, which was Super shooting D.H., took place after appellant asked Super for a ride, appellant has satisfied the first element. The second

element requires that the intervening cause did not happen because of the original negligence. *Id.* Because a shooting does not generally follow from a request for a ride to a person's house, this element is also satisfied. The third element of the *Hofer* test requires that the intervening cause changed the natural course of events and made the result different from what it would have been. *Id.* This element is also satisfied because appellant's request that Super drive her to D.H.'s house would not have led to D.H.'s death if Super had not shot D.H.

The crux of the analysis for the fourth element is reasonable foreseeability. If appellant could not have reasonably anticipated D.H.'s death, she is barred from criminal liability for the death of D.H. *See id.* We conclude that appellant has failed to satisfy this element.

The Minnesota Supreme Court addressed the foreseeability element for a manslaughter conviction in *Schaub* and concluded that it was reasonably foreseeable that the defendant's act of turning on the gas in his apartment in an attempt to commit suicide could lead to an explosion that could harm others. 231 Minn. at 519-20, 44 N.W.2d at 65-66. In *Schaub*, the defendant's act of turning on the gas led to police officers rescuing defendant, which in turn led to the owner of the building causing the explosion by turning off a light switch in defendant's empty apartment. *Id.* at 520, 44 N.W.2d at 65. The court concluded that, "[w]hile defendant might not have foreseen that an explosion would result in exactly that manner, it is common knowledge that gas collected in large quantities is highly explosive . . . and he could have easily foreseen that others would smell the gas and, upon investigating its origin, would come to harm of some sort. *Id.*

Here, appellant may not have foreseen that the victim would be killed in the manner that he was, but appellant had knowledge about the conflicts between Super and D.H., and knew of Super's reputation for carrying and using his gun. And although appellant may not have intended for D.H. to be harmed or killed, the jury could have properly determined that she could have anticipated that harm may occur.

In convicting appellant of second-degree manslaughter, the jury, pursuant to its instructions, determined that appellant was the proximate cause of D.H.'s death. Because we defer to the jury's verdict and view the evidence in the light most favorable to that verdict, we conclude that the fourth element of the *Hofer* test is not satisfied. Thus, the evidence was sufficient to prove that appellant was the proximate cause of D.H.'s death and that Super's conduct did not constitute an intervening cause, absolving appellant of criminal liability for the death.

II.

At the close of the state's case, the defense moved for an acquittal on the two remaining charges of first-degree murder and second-degree murder. The district court requested briefing on the motion by the parties. In the state's memorandum opposing the motion, the state included a request that the court instruct the jury on lesser-included offenses. Subsequently, the district court, outside the presence of the jury, first granted the defense motion for acquittal on the murder charges, and then granted the state's request to amend the charge to include the lesser-included offense of second-degree manslaughter.

Appellant did not object to the dismissals and addition of charges until after the jury convicted him of second-degree manslaughter. At that time, appellant moved for a new trial arguing that when the district court dismissed the murder charges the case was over and the district court no longer had the discretion to amend the charges. The district court denied the request for a new trial.

The decision of a district court on a motion for a new trial will not be disturbed on appeal except upon a showing of a clear abuse of discretion. *State v. Meldahl*, 310 Minn. 136, 138, 245 N.W.2d 252, 253 (1976).

The court's decisions to dismiss the charges against appellant before adding the lesser-included offense charge occurred outside the presence of the jury. Therefore, the jury was not affected by the alleged technical error in timing, and we properly review the substantive merits of adding the lesser-included offense rather than its timing. *See State v. Erickson*, 597 N.W.2d 897, 903 (Minn. 1999) (stating that although the appellant established a technical error, the failure to make findings on the record, the court would examine the record to determine if the substantive reasons behind the error, the decision to order restraints, were justified, thereby rendering the error harmless).

It is within the district court's discretion to amend an indictment or complaint "at any time before verdict if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." Minn. R. Crim. P. 17.05. A defendant may be convicted of either the crime charged or an included charge, but not both. Minn. Stat. § 609.04 (2006). The determination of which lesser-included offenses to submit to the jury is within the sound discretion of the district court. *Bellcourt v. State*, 390 N.W.2d

269, 273 (Minn. 1986) (citations omitted). But a district court must instruct the jury on a lesser offense if the evidence warrants the instruction. *State v. Sessions*, 621 N.W.2d 751, 757 (Minn. 2001).

In *State v. Leinweber*, the Minnesota Supreme Court concluded that, based on the factual circumstances, it was appropriate for the district court to instruct on second-degree manslaughter where the defendant had originally been charged with second-degree murder. 303 Minn. 414, 417, 228 N.W.2d 120, 123 (1975). Here, second-degree manslaughter is a lesser degree of appellant's charge in Count II, second-degree intentional murder.

We conclude that because the district court's ruling was justified on the merits, the district court's acquittal of appellant of the remaining two charges before charging her with the lesser-included offense did not prejudice appellant. Thus, the district court did not abuse its discretion in denying appellant's posttrial motion.

Affirmed.